

***United States Court of Appeals
for the Second Circuit***

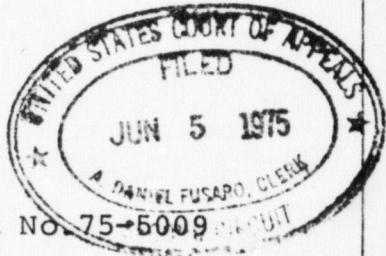


REPLY BRIEF

6-10-75

75-5009

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



In the Matter of . . . : Docket No. 75-5009
M. E. GREEN CO., INC., : AFFIDAVIT IN OPPOSITION
Bankrupt. : TO APPELLANT'S MOTION
FOR A STAY

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RALPH C. MENAPACE, JR., being duly sworn, deposes and
says:

1. I am an attorney admitted to practice before this Court and a member of the firm of Cahill Gordon & Reindel, special counsel to Bernard Bernstein, trustee of the above-named bankrupt (the "Trustee"), an appellee herein. I submit this affidavit in opposition to the motion of appellant Harry Silverman ("Silverman") for a stay of the implementation of the October 29, 1973 Settlement Agreement which settles and compromises certain disputes between the Trustee and others. I also submit this affidavit in support of the cross-motion of Michael E. Green, a party to the Settlement Agreement, which cross-motion seeks dismissal of the present appeal.

2. The present appeal taken by Silverman challenges the May 7, 1975 decision of United States District Judge Inzer Wyatt, which had, in turn, affirmed the Bankruptcy Court's approval of the settlement in question. Silverman, who has filed a general claim of \$85,000 against the bankrupt estate and against whom the Trustee has filed a counterclaim in excess of \$500,000, seeks to bring this appeal despite the fact that, after a long series of delays resulting from his conduct, he defaulted in the presentation of his objection to the settlement in the Bankruptcy Court and despite the fact that, as a general creditor, his standing to bring this appeal as of right is questionable and leave to appeal has not been granted.* The effect of these circumstances in depriving Silverman of standing to bring the present appeal is discussed in the papers submitted in support of the cross-motion of Michael E. Green to dismiss the appeal and the Trustee urges the dismissal of the appeal for the reasons set forth in

* Significantly, it was Silverman himself who first raised the question of leave to appeal. He originally sought such leave in the District Court, but, upon information and belief, his counsel eventually suggested such request was inadvertent; the motion in which such relief was sought was thereafter denied by the District Court except insofar as an interim stay was granted to permit an application for a stay to be made to this Court. See Order to Show Cause dated May 14, 1975, and May 16, 1975 memo endorsement thereof by Judge Wyatt annexed as Exhibit A to this affidavit.

those papers.* The fourteen-month delay in concluding the hearing on the objection originally filed by Silverman, his ultimate default described in those cross-motion papers and the frivolous nature of the present motion by Silverman, are illustrative of the roadblocks which Silverman has placed in the path of the prompt disposition of the bankrupt estate, apparently intending thereby to delay ultimate disposition of the Trustee's \$500,000 counterclaim against him, trial of which has been stayed pending resolution of the settlement in question. It is noteworthy, in this regard, that Silverman filed the only objection to the settlement, although scores of claims are outstanding.

3. By his present motion Silverman seeks a stay of the implementation of the underlying Settlement Agreement, pending resolution of the appeal. Yet the very Settlement Agreement which Silverman attacks and the courts below approved, by its own terms, provides that it will not be acted upon until the fifth day after the Bankruptcy Court's approval of the settlement "becomes final and no longer subject to any appeal or further appeal. . . ." (Settlement Agreement at ¶ 8; the

* To the list of the deficiencies in the appeal should be added the apparent failure of Silverman to post the bond for costs required by Rule 7 F.R.A.P.

Agreement is annexed to the appellant's motion.)* Thus, as the moving papers all but concede, there is no need for judicial intervention here, since it is clear that the relief pending appeal which Silverman seeks is already available to him. It is clear that under such circumstances Silverman can hardly demonstrate the irreparable harm required to support the grant of a stay and such stay should not be granted.

4. However, in the event a judicial stay is insisted upon by Silverman and granted by this Court, the Trustee and the other parties to the Settlement Agreement are entitled to a substantial bond to compensate them for the losses to be suffered during the time the appeal is pending. Rule 8(b) F.R.A.P.

5. Although \$108,000 in cash, payable to the Trustee under the terms of the Settlement Agreement, has been paid to the escrow agent, the estate has been denied any return on this money by the interminable delays resulting from the litigation

* Incredibly, though it is the Settlement Agreement which is at the very heart of this appeal, Silverman's counsel "was unaware" at the time he sought a stay in the district court that the Agreement was, by its own terms, not to become effective until the Bankruptcy Court's approval of the compromise "becomes final and no longer subject to any appeal or further appeal. . . ." (Settlement Agreement ¶ 8). Silverman's moving papers attempt to pass off this extraordinary oversight as to a key provision of the Agreement by noting that counsel was "only apprised of its existence at the hearing" on the stay motion in the district court (Appellant's "Motion for Supersedeas" at p. 3). But the Settlement Agreement was annexed to the motion for approval of the compromise and settlement made back in November, 1973, was part of the record below, and has been discussed fully by both sides in the course of this dispute. It is indicative of the frivolousness of the present appeal that under these circumstances Silverman's counsel needed to be "apprised" of the contents of the very Agreement this appeal seeks to challenge.

pursued by Silverman. Additionally, other important proceedings with respect to the administration of the bankrupt's estate have ground to a halt pending resolution of the present dispute. Most notable among these delays has been the postponement of the trial of the Trustee's counterclaim against Silverman himself for an amount in excess of \$500,000, a trial postponed by the Bankruptcy Court until the resolution of the settlement. This delay of the counterclaim against him, which I believe to be the major consideration in Silverman's decision to challenge the settlement, has deprived the bankrupt estate of a potentially significant recovery in a matter which was ready for trial more than two years ago. Apart from the harm suffered by the Trustee, the other parties to the present controversy have been significantly damaged by the present appeal and such injury will be aggravated during the pendency of this appeal, as demonstrated in the affidavit of Martin Szold, Esq. submitted in support of the cross-motion. These factors alone support the Trustee's request for a substantial bond should a judicial stay be sought.

6. Additionally, however, it is the Trustee's intention to move at an appropriate time, pursuant to Rule 38 F.R.A.P. and 28 U.S.C. § 1912, for an award of damages and double costs against Silverman in light of the frivolous and dilatory

nature of the present appeal. Under these circumstances it is all the more appropriate that should the appeal be permitted to proceed, and a judicial stay be granted, a substantial bond should be made available to protect the interests of the estate and the other parties to the settlement.

Ralph C. Menapace, Jr.
Ralph C. Menapace, Jr.

Sworn to before me this

4th day of June, 1975

Stella Marotta

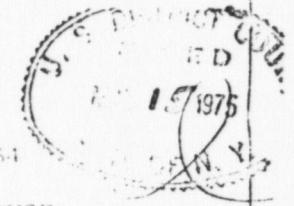
Notary Public

STELLA MAROTTA
Notary Public, State of New York
No. 24-2544450
Qualified In Kings County
Certificate Filed in New York County
Commission Expires March 30, 1977

EX.
A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TBW



IN RE

No. 70 B 464

M.E. GREEN CO., INC.

ORDER TO SHOW CAUSE

BANKRUPT.

At New York in said District on the 14th day of May, 1975.

Upon the annexed affidavit of Alex L. Rosen, Attorney for Harry Silverman, the appellant herein, sworn to the 14th day of May, 1975, and upon all prior pleadings and proceedings had herein, it is hereby

ORDERED that

1. Bernard Bernstein, the Trustee
2. Michael Green
3. Harry Green
4. Zelda Cohen

show cause before this Court on the 14th day of May 1975 at 2:30 o'clock in the afternoon of that day in Room 506 of the United States District Court for the Southern District of New York, at the United States Court House, Foley Square, New York, N. Y. why an Order should not be issued granting Harry Silverman leave to appeal, staying the execution of each and every element of the compromise and settlement of controversies among and between the Trustee, Michael Green, Harry Green and any other parties to the compromise and settlement approved by the Order of Bankruptcy Judge Edward J. Ryan dated Jan. 21, 1975 and affirmed by Order of U. S. District Judge Inzer B. Wyatt entered May 7, 1975; said stay to be in effect pending the determination of the appeal of Harry Silverman from such Order to the United States Court of Appeals.

LET PERSONAL SERVICE of a copy of this Order to Show Cause
and supporting affidavits upon the persons and parties afore-
mentioned or upon their partners or Officers of a Corporation,
or upon their attorneys at their last known addresses, on or
6 p.m. on
before the 14 day of May, 1975 be deemed good and sufficient
service.

Dated: New York, N. Y.
May 14, 1975

3:10 p.m.

J. M. Bliegal
District Court Judge

IN RE

No. 70 B 464

M. E. GREEN, C. A.

AFFIDAVIT

BANKRUPT

-----X

STATE OF NEW YORK, ss:
COUNTY OF NEW YORK,

ALEX L. ROSEN, being duly sworn, deposes and says:

1. That he is the attorney for Harry Silverman and has filed his retention with the court on April 24, 1974.
2. That your deponent has brought this matter on by Order to Show Cause rather than by motion due to the severe time limitation within which to obtain the stay requested herein as both the Federal rules of Civil Procedure and the Federal Rules of Appellate procedure provide for but a (10) ten day automatic stay after entry of the order in issue.
3. That although a stay from the District Court pending appeal to the Court of Appeals is generally granted as of right, (subject to certain exceptions, inapplicable here) and may even be granted ex-parte where it concerns a judgment for money only by the posting of a supersedeas bond by the appellant in an amount sufficient to protect the appellee; the case at bar, is neither for a money judgment alone nor does it readily lend itself to determination as to the amount of such bond; or indeed whether any bond ought be required whatsoever. Such a determination being within the discretion of the court, some notice must and should be given the opposing parties, necessitating this show cause order in the interest of fairness and expediency.

4. That your deponent has by statute only 10 days from May 7, 1975, the date of entry of the Order appealed from, to obtain this stay, or the appeal would be rendered moot by the certain execution of the various agreements which this appeal seeks to avoid. Therefore, it would be virtually impossible to bring this application on by notice of motion with the fatal delay that proper notice thereby would occasion.

5. That it is mandatory that this matter be heard immediately so that appellant herein does not find himself foreclosed from his right to appeal through no fault of his own; and so that the proper amount, if any, to be posted by supersedeas bond be determined promptly so that appellant be afforded sufficient time to have such bond, should the court deem one necessary, prepared and posted within the statutory period.

Alex L. Rosen

Alex L. Rosen

Sworn to before me this 14th day
of May, 1975

JONATHAN R. NEEDLE
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-216264
Qualified in New York County
Commission Expires March 30, 1978

Jonathan R. Needle

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified) true copy of a duly certified in the office of the clerk of the within-named court on 19

Date J,

Yours, etc.,
ALEX L. ROSEN

Attorney for

Office and Post Office Address:
225 BROADWAY
New York, N. Y. 10007

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within cause.

Yours, etc.,
ALEX L. ROSEN

Attorneys for

Office and Post Office Address:
225 BROADWAY
New York, N. Y. 10007

• 10

Attorney(s) for Plaintiff:

Table 79. — *U. S. 75*

UNITED STATES GOVERNMENT
SCOTTSDALE, ARIZONA

IN RI

IN RE

Motion granted
that all actions
in Court
to be May 17, 1941.

Settled
copy will be presented
within named time.

ALEX L. ROSEN
Attorney for Harry Silverman
Office and Post Office Address, Telephone
225 BROADWAY
New York, N. Y. 10007
(212) BARCLAY 7-1700

To

Attorney(s) for

T

Attorney(s) for

Service of a copy of the wish

B

1980-1981

is hereby admitted

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of
M. W. GREEN CO., INC.,

Bankrupt.

AFFIDAVIT IN OPPOSITION
TO APPELLANT'S MOTION
FOR A STAY

CAHILL GORDON & REINDEL
Attorneys for Special Counsel
For The Trustee - Appellee
Office and Post Office Address,
80 Pine Street,
Borough of Manhattan, New York, N.Y. 10005
944-7400

To _____ Esq.
Attorney for _____

Due and timely service of a copy of the
within _____

is hereby admitted.

Dated, N.Y., _____, 19____

Attorneys for _____